Cornell Law Review

Volume 58
Issue 2 *January 1973*

Article 8

Constitutional Law-Sixth Amendment-Right to a Speedy Trial-A Balancing Test

Richard D. Avil Jr.

Constitutional Law—Sixth Amendment—Right to a Speedy Trial—A Balancing Test

Barker v. Wingo, 407 U.S. 514 (1972)

The Supreme Court has addressed itself infrequently to the sixth amendment guarantee of a speedy trial.[1] Furthermore, each previous decision considered only a single aspect of that right.[2] Not until 1967 did the Court hold that the guarantee is one of those "fundamental" rights binding on the states through the due process clause of the fourteenth amendment.[3] *Barker v. Wingo*[4] stands as the first attempt by the Court to speak comprehensively to the question of speedy trial, and to develop guidelines by which the right is to be measured.[5]

Petitioner Willie Mae Barker was convicted of the murder of an elderly couple in the Circuit Court of Christian County, Kentucky, five years and sixteen prosecution-requested continuances after his indictment for the crime in September 1958.[6] Barker failed to object to the

---

1 *See, e.g.*, United States v. Marion, 404 U.S. 307 (1971) (sixth amendment right attaches only after arrest or indictment); Dickey v. Florida, 398 U.S. 30 (1970) (seven year delay held to require dismissal of charges when defendant available for trial at all times and prejudice shown); Smith v. Hooey, 393 U.S. 374 (1969) (state has duty to make diligent, good faith effort to bring prisoner in another jurisdiction to trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment right to speedy trial fundamental and binding on states through fourteenth amendment); United States v. Ewell, 383 U.S. 116 (1966) (delay due to retrial after reversal of conviction not ordinarily violation of sixth amendment); Pollard v. United States, 352 U.S. 354 (1957) (delay in sentencing not per se violation of sixth amendment when promptly corrected on discovery); Beavers v. Haubert, 198 U.S. 77 (1905) (sixth amendment does not require that multiple offenses be tried in order indictments were filed).

2 *See* note 1 *supra*. This piecemeal approach is evident in United States v. Marion, 404 U.S. 307 (1971). There the majority held that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provisions of the Sixth Amendment." *Id.* at 320. This inflexible approach generated a strong dissent from Justice Douglas, in which he was joined by Justices Brennan and Marshall. Citing Miranda v. Arizona, 384 U.S. 436 (1966), which extended other sixth amendment protections to preindictment situations, the minority argued for an ad hoc approach to the sixth amendment, focusing on "the nature of the event and its effect on the rights involved." *Id.* at 333. This method of analysis foreshadowed that of the unanimous Court in *Barker*.

3 Klopfer v. North Carolina, 386 U.S. 213 (1967).

4 407 U.S. 514 (1972), *aff'g* 442 F.2d 1141 (6th Cir. 1971), *aff'g* Civ. No. 2046 (W.D. Ky. June 1, 1970).

5 The Court in *Barker* acknowledged Justice Brennan's observation in Dickey v. Florida, 398 U.S. 30, 40-41 (1970), that no previous Supreme Court decision had delineated a single set of criteria for measuring the right to a speedy trial. His concern prompted him to make an extended individual analysis of the right in that decision. *Id.* at 41-56.

6 407 U.S. at 516-18.

first eleven continuances until he moved to dismiss the indictment in February 1962. The motion was denied. Barker did not renew this objection to the thirteenth and fourteenth continuances which were granted in June and September of 1962. The prosecution had requested the first fourteen delays in order to permit it to first try Barker's alleged accomplice whose testimony it considered vital to Barker's conviction.[7] The accomplice was finally convicted in December 1962,[8] but two more continuances were ordered due to the illness of the chief investigator, an ex-sheriff.[9] When trial was finally commenced on October 9, 1963, Barker again moved for dismissal, specifically relying on his right to a speedy trial. The motion was denied; the trial began and Barker was convicted and sentenced to life imprisonment.[10] On appeal Barker again advanced his speedy trial claim; the conviction was affirmed.[11] Six years later, in February 1970, the District Court for the Western District of Kentucky denied Barker's petition for a writ of habeas corpus, which was based on speedy trial grounds; the decision of the district court was affirmed by the Sixth Circuit.[12] The Supreme Court granted certiorari.[13]

The practical effects of the *Barker* opinion can perhaps be understood by contrasting the Supreme Court's treatment of the facts with the treatment afforded by the Sixth Circuit.[14]

The Sixth Circuit found that Barker had waived any claim based on denial of a speedy trial prior to February 1963, the date of his first objection.[15] The court went on to hold that the remaining delay was not unduly long and that it was attributable to an excusable cause—the illness of the ex-sheriff.[16] Finally, finding that Barker had failed to carry the burden of establishing prejudice to his defense,[17] the court denied his petition.

---

7 *Id.* at 516. The prosecution felt that by first convicting the accomplice, self-incrimination hurdles to the use of his testimony against Barker would be removed. *Id.*

8 The effort to convict the accomplice extended through two reversals (Manning v. Commonwealth, 328 S.W.2d 421 (Ky. 1959) (admission of evidence from illegal search); Manning v. Commonwealth, 346 S.W.2d 755 (Ky. 1961) (improper denial of request for change of venue)) and two hung juries before its ultimate success in March 1962 as to one victim, and December 1962 as to the other. 407 U.S. at 517.

9 407 U.S. at 517-18.

10 *Id.* at 518.

11 Barker v. Commonwealth, 385 S.W.2d 671 (Ky. 1964).

12 442 F.2d 1141 (6th Cir. 1971).

13 404 U.S. 1037 (1971).

14 442 F.2d 1141 (6th Cir. 1971).

15 *Id.* at 1143. This finding was factually incorrect. Barker first objected in February 1962. 407 U.S. at 518-19.

16 442 F.2d at 1144.

17 *Id.* at 1143-44.

Unlike the Circuit Court, the Supreme Court took into consideration the entire length of delay, more than five years, which it characterized as "extraordinary."[18] Nor did the Court accept the Sixth Circuit's determination that the delay was excusable. With the exception of the seven month delay attributable to the illness of the ex-sheriff, the Court found the explanations advanced by the prosecution unpersuasive.[19] Although the Court noted that some delay for the purpose of securing the testimony of Barker's accomplice would be permissible, it criticized the fact that much of this delay was caused by retrials necessitated by the state's failure to try the accomplice consonant with due process.[20]

Two factors, however, weighed heavily against Barker. Of crucial importance was the Court's conclusion that Barker did not wish to be tried.[21] This was inferred from Barker's failure to object for nearly three and a half years, and from his failure to renew the motion until his accomplice was finally convicted.[22] Second, prejudice was considered to be minimal since there was no claim of injury to the defendant's ability to mount a defense.[23] After considering these factors, the Court concluded that the decision of the Sixth Circuit should be affirmed, although it called the case "close."[24]

The Court reasoned that a sixth amendment speedy trial claim must be decided by using a balancing test which includes at least four factors: the length of delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant.[25] The Court stressed that these are only factors, and that no one of them standing alone is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial."[26] Furthermore, these factors are not exclusive; they are to be "considered together with such other circumstances as may be relevant."[27]

---

18 407 U.S. at 533.

19 *Id.* at 534.

20 *Id.*

21 *Id.*

22 *Id.* at 534-36.

23 *Id.* at 534.

24 *Id.* at 533.

25 *Id.* at 530.

26 *Id.* at 533.

27 *Id.* It is difficult to imagine other relevant circumstances which could not be subsumed under one of the four broad headings the Court set out. This language seems to be merely another example of the desire of the Court to retain judicial flexibility in the speedy trial area, a desire which is evidenced throughout the entire opinion.

I

FACTORS IN THE BALANCE

The factors which the Court indicates should be weighed in the balance are not in themselves innovative; they represent a recognition of the considerations which lower courts have frequently weighed in evaluating speedy trial claims.[28] However, the Court's comments as to what elements must be considered within each broad category, and their relative weight, will have a lasting impact on both state and federal criminal practice.[29]

A. *Length of Delay*

The current state of the law with respect to this first factor is aptly described by the Supreme Court's observation in *Beavers v. Haubert*[30] that "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances."[31] Recognizing the imprecision of this approach, a number of states, by court rules[32] or statutes,[33] have prescribed time limits within which accused persons must be brought to trial. This approach is recommended by the American Bar Association.[34] On the federal level, time limits will soon be required in every district under the new Federal Rules of Criminal Procedure.[35]

Although it has affirmatively required the federal courts to adopt

---

28 *See, e.g.*, Buatte v. United States, 350 F.2d 389, 394 (9th Cir. 1965), *cert. denied*, 385 U.S. 856 (1966); United States v. Simmons, 338 F.2d 804, 807 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965); United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963); State v. Ball, 277 N.C. 714, 717, 178 S.E.2d 377, 380 (1971); *cf.* Dickey v. Florida, 398 U.S. 30, 48 (1970) (concurring opinion). *See also* Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 863-67 (1957); Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 478 (1968).

29 For example, the demand-waiver rule has been held unconstitutional. *See* notes 53-62 and accompanying text *infra*.

30 198 U.S. 77 (1905).

31 *Id.* at 87.

32 *See, e.g.*, ARIZ. R. CRIM. P. 236; FLA. R. CRIM. P. 3.191; IND. R. CRIM. P. 4; N.M.R. CIV. P. 95. *See also* note 33 *infra*.

33 *See, e.g.*, CAL. PENAL CODE § 1382 (West 1970); ILL. ANN. STAT. ch. 38, § 103-05 (Smith-Hurd 1970); IOWA CODE ANN. § 795.2 (Supp. 1972); NEV. REV. STAT. § 178.556 (1969); PA. STAT. ANN. tit. 19, § 781 (1964); WASH. REV. CODE ANN. § 10.46.010 (1961); WIS. STAT. ANN. § 971.10 (1971). State court rules (*see* note 32 *supra*) and a majority of these state statutes are collected and discussed in Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794 (1972).

34 ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 14 (1968).

35 Recently approved Federal Rule of Criminal Procedure 50(b), effective October 1, 1972, orders each district court to prepare a plan for the prompt disposition of its criminal

specific time limits under the Federal Rules, the Supreme Court in *Barker* declined to extend such a requirement to the states under constitutional aegis, noting that

> [s]uch a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.[36]

The Court did, however, recognize the propriety of time limits established by state statutes or court rules.[37]

In addition, the Court suggested that length of delay occupies a unique position in the balancing process. It compared the factor to a "triggering mechanism"; unless the reviewing court first finds that the delay which has occurred is prima facie unreasonable—in the Court's words, "presumptively prejudicial"[38]—it need not inquire further.[39] The Court also suggested that the primary variable in determining the

---

caseload. This plan must include time limits within which pre-trial procedures, the trial itself, and sentencing are to take place. Under 50(b), each district is required, within 90 days of the effective date of the rule, to submit its plan to a reviewing panel for approval. The reviewing panel will consist of the judicial council of the circuit, and either the chief judge of the district whose plan is being reviewed or such other acting judge in the district as the chief judge may designate. The rule also provides for a continuing study of the issue and subsequent revision of the plans submitted.

36 407 U.S. at 523. However, Judge J. Skelly Wright, concurring in Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963), although not arguing for the imposition of specific time limits, presented a strong argument for the imposition of minimum constitutional standards. Judge Wright noted that

> [t]he legislature is free to implement the constitutional right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment, whatever the terms of the statnte.

Id. at 813 n.4.

There is also constitutional precedent for the specific quantification of sixth amendment rights. In Baldwin v. New York, 399 U.S. 66, 68 (1970), the Supreme Court held that the sixth amendment right to a jury trial could not be denied in any criminal prosecution where the maximum penalty exceeded six months imprisonment. It should be noted, however, that the Court was heavily influenced in its decision by the fact that New York City was the only locale with a statute refusing the right to trial by jury for offenses of this magnitude.

37 "The States, of course, are free to prescribe a reasonable period consistent with constitutional standards . . . ." 407 U.S. at 523.

38 *Id.* at 530. The use of this phrase is particularly significant in an analysis of the Court's fourth factor—prejudice to the defendant. *See* notes 80-81 and accompanying text *infra.*

39 407 U.S. at 530.

amount of delay permissible in a specific case should be the nature and complexity of the crime charged.[40]

B. *Reasons for the Delay*

The second factor in the balance has traditionally been composed of the following subclasses: delay attributable to the defendant's actions, delay purposefully and oppressively caused by the prosecution, and so-called "neutral reasons" for delay, encompassing such diverse causes as court congestion and negligence on the part of the prosecution.[41]

Delay attributable to the actions of the defense has presented no problem for the courts; the defendant must bear the consequences of delay for which he is responsible.[42] This view was explicitly approved in *Barker*.[43] However, the prevailing interpretation has been that a defendant must also shoulder the burden of delay from neutral sources;[44] he can only claim the benefit of delay resulting from purposeful and

---

40 Until there is some delay which is presumptively prejudicial, there is no necessity of inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Id. at 530-31 (footnote omitted).

Justice Douglas, concurring in United States v. Marion, 404 U.S. 307 (1971), had earlier expounded this theme. Speaking of the facts of that case, he said:

> If this were a simpler crime, I think the British precedent which I have cited would warrant dismissal of the indictment because of the speedy trial guarantee of the Sixth Amendment. But we know from experience that the nature of the crime charged here [conspiracy to commit fraud] often has vast interstate aspects, the victims are often widely scattered and hard to locate, and the reconstruction of the total scheme of the fraudulent plan takes time. If we applied the simpler rule that was applied in simpler days, we would be giving extraordinary advantages to organized crime as well as others who use a farflung complicated network to perform their illegal activities.

Id. at 335.

Some speedy trial rules distinguish between types of crimes. *See, e.g.*, FLA. R. CRIM. P. 3.191 (felony: 180 days; misdemeanor: 90 days). *See also* Note, *supra* note 33, at 804 nn. 45-51.

41 *See* Note, *supra* note 28, 57 COLUM. L. REV. at 856-59; Note, *supra* note 28, 20 STAN. L. REV. at 480-81.

42 *See, e.g.*, United States v. Lustman, 258 F.2d 475, 477 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958) (delay due primarily to defendant's motions held not to violate right of speedy trial).

43 "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine . . . ." 407 U.S. at 529.

44 King v. United States, 265 F.2d 567 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959) (five month delay due to congested criminal calendar); People v. Ganci, 27 N.Y.2d 418, 267 N.E.2d 263, 318 N.Y.S.2d 484 (1971) (16 month delay primarily due to court congestion).

oppressive acts of the prosecution.[45] The obvious harshness of this rule, which charges the defendant with delay due not only to circumstances beyond his control but with that created by his adversary, the state, has come under attack,[46] and is reflected in at least one formal speedy trial scheme.[47]

The handling of trial delay caused by overcrowded court dockets has already become a significant issue in speedy trial litigation and promises to assume even greater importance as the workload of courts increases.[48] But the Court in *Barker* declined to take an affirmative stand against delay due to court congestion. Although it endorsed in principle the argument that court congestion is the ultimate responsibility of the state[49] and held that delay due to such congestion must

---

45 Pollard v. United States, 352 U.S. 354, 361 (1957). *See* United States v. Marion, 404 U.S. 307, 325 (1971) (intentional acts by prosecution to harass defendants or gain tactical advantage over them impermissible). But on the issue of negligent prosecutorial delay, see Hanrahan v. United States, 348 F.2d 363, 368 (D.C. Cir. 1965); United States v. Reed, 285 F. Supp. 738, 741 (D.D.C. 1968).

46 Smith v. United States, 331 F.2d 784, 787-89 (D.C. Cir. 1964) (en banc) (dissenting opinion). In King v. United States, 265 F.2d 567 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959), the circuit court, although denying petitioner's speedy trial claim on the merits, stated:

> Cases have to take their turn. The case on trial is entitled to deliberate consideration; the others on the calendar stack up. At the same time, too much heed to practicalities may encroach upon the individual's rights. If the legislature were to refuse to install sufficient judicial machinery to perform the judicial tasks, it might be necessary to turn some accused persons loose.

Id. at 569.

Dissenting in People v. Ganci, 27 N.Y.2d 418, 267 N.E.2d 263, 318 N.Y.S.2d 484 (1971), Chief Judge Fuld was even more direct:

> [I]t is the responsibility of the State, or of its subdivisions, to do what is necessary—by furnishing funds, facilities and personnel—to assure the effective operation of the judicial system, and that burden may not be shifted to the defendant. The rule is simply stated; constitution and statutes mandate a speedy trial, and it is incumbent on the State to provide it.

Id. at 430-31, 267 N.E.2d at 270, 318 N.Y.S.2d at 494.

47 FLA. R. CRIM. P. 3.191(f) (congestion of court docket specifically excluded from exceptional circumstances extension).

48 In 1970 there were 38,102 criminal cases filed in the federal district courts, representing a 13% increase in a single year. JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: 1970, at 144 (1971). Although the number of cases completed in 1970 was the highest since 1955, it was less than the number of filings; thus, the number of cases pending in 1970 rose to 20,910, an 18% increase over 1969. *Id.* at 145. An "emergency" situation has thus been created in six federal judicial districts. In those districts, more than 30% of the criminal cases have been pending one year or longer. *Id.* at 155-56.

49 "The rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." 407 U.S. at 529. One must question the extent to which the Court has fully embraced the concept of "affirmative duty" in view of its tacit approval of delay due to court congestion.

be given consideration in any balancing formula, it undermined the force of this position by adding that this type of "neutral reason . . . should be weighed less heavily."[50] Thus, a court evaluating a speedy trial claim may no longer ignore delay due to court congestion entirely; however, it is given broad discretion as to the weight which should be attached to such consideration.

This failure to deal positively with delay caused by court congestion sparked the only visible hint of dissent in an otherwise unanimous Court. Justice White, in a concurring opinion joined by Justice Brennan,[51] forcefully asserted that "only special circumstances presenting a more pressing public need *with respect to the case itself* should suffice to justify delay."[52]

C. *Defendant's Assertion of the Right*

The demand-waiver rule has been followed in most of the states[53] and in a majority of the federal circuits.[54] Briefly stated, the rule requires that a defendant raising a sixth amendment speedy trial claim have previously made a demand for trial. Even after this demand has been made, the defendant is deemed to have waived objection to any delay occurring prior to the demand.[55] The rule is based on the assumptions that delay often works to the benefit of defendants[56] and that failure to demand or to object is equivalent to acquiescence.[57] Thus, it follows that a defendant should not be permitted to benefit from a delay to which he presumably acquiesced to his own advantage. Concurring

---

50 *Id.* at 531.

51 *Id.* at 536-38.

52 *Id.* at 537 (emphasis added). Justice White also directed the Court's attention to its own observation that permitting a lack of public resources to excuse delay "subverts the State's own goals in seeking to enforce its criminal laws." *Id.* at 538.

53 *E.g.*, Randolph v. State, 234 Ind. 57, 122 N.E.2d 860 (1954), *cert. denied*, 350 U.S. 889 (1955). This rule is embraced even in some states with speedy trial statutes. *See, e.g.*, State v. Christensen, 75 Wash. 2d 678, 684, 453 P.2d 644, 648 (1969). Other states, however, have rejected the doctrine. *See, e.g.*, Rutherford v. State, 486 P.2d 946 (Alas. 1971); State v. Hess, 180 Kan. 472, 304 P.2d 474 (1956); People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955).

54 *E.g.*, Barker v. Wingo, 442 F.2d 1141 (6th Cir. 1971), *aff'd on other grounds*, 407 U.S. 514 (1972); United States v. Perez, 398 F.2d 658 (7th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969); United States v. Hill, 310 F.2d 601 (4th Cir. 1962). *But cf.* Bandy v. United States, 408 F.2d 518 (8th Cir. 1969). *Barker* itself discusses the approach of individual states and federal circuits to the demand-waiver rule. 407 U.S. at 524-25.

55 407 U.S. at 525.

56 United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620 (2d Cir. 1963). There the court noted that "[s]uch a rule is based on the almost universal experience that delay in criminal cases is welcomed by defendants as it usually operates in their favor." *Id.* at 623 (footnote omitted).

57 *E.g.*, Collins v. United States, 157 F.2d 409 (9th Cir. 1946).

in *Dickey v. Florida*,[58] however, Justice Brennan questioned this rationale, arguing that

> [i]t is possible that the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial. The accused has no duty to bring on his trial. He is presumed innocent until proved guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay.[59]

Although it rejected strict application of the demand-waiver rule as "inconsistent with this Court's pronouncements on waiver of constitutional rights,"[60] the Court in *Barker* stated that inaction on the part of the defendant will serve to raise a strong presumption of consent: "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[61] The Court's examples of situations in which the presumption of waiver might be overcome suggest that waiver will not be implied primarily in situations in which the defendant did not have a legally sufficient opportunity to object.[62]

The Court also injected a new element into the consideration of defendant's conduct—the frequency and force of his objections.[63] Under the traditional demand-waiver rule, any demand for trial was sufficient to toll the operation of the waiver.[64] But under *Barker*, the strength and number of defendant's efforts become material to the

---

58 398 U.S. 30, 39-57 (1970).

59 *Id.* at 50.

60 407 U.S. at 525. *E.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver is "intentional relinquishment or abandonment of a known right or privilege"); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) (courts should "indulge every reasonable presumption against waiver"). More directly in point is Carnley v. Cochran, 369 U.S. 506 (1962). There the Supreme Court stated: "Presuming waiver from a silent record is impermissible." *Id.* at 516.

61 407 U.S. at 532.

62 The Court suggested exceptions to the demand requirement when the accused has not been represented by counsel (*id.* at 529), has been represented by incompetent counsel, has been severely prejudiced by the delay, or when continuances were granted to the prosecution *ex parte*. *Id.* at 536. Exceptions of this type had often been recognized under prior law. *See, e.g.*, People v. Wyatt, 24 Ill. 2d 151, 180 N.E.2d 478 (1962) (since defendant not represented by counsel, held not responsible for delay proposed by court to which he acquiesced). *But see* United States v. Perez, 398 F.2d 658 (7th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969) (waiver found although defendant not represented by counsel or informed by court of his right to speedy trial).

63 407 U.S. at 529.

64 *See* Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947) (some kind of effort to secure speedy trial); State v. Murdock, 235 Md. 116, 122, 200 A.2d 666, 669 (1964) (dictum) (oral or written request to any judge in county sufficient demand). *But see* People v. Duncan, 373 Mich. 650, 653, 130 N.W.2d 385, 388 (1964) (formal record demand required to invoke constitutional guarantee).

success of his claim; the frequency and force with which the right is asserted serve as a barometer of prejudice to the defendant, which often cannot be adequately expressed in the record.[65] The Court in *Barker* based its conclusion that the defendant did not really want to be tried not only on his failure to make an objection for three and a half years, but also on his failure to renew his objection upon notice of the prosecution's motions for two additional continuances. In fact, the defendant did not raise another objection until his accomplice had finally been convicted.[66]

D. *Prejudice*

The position taken by the Court on the prejudice factor is unclear. Controversy over the issue of prejudice has centered on two areas: the type of detriment which should be considered prejudicial in the constitutional sense,[67] and the allocation of the burden of establishing the existence or absence of such prejudice in the defendant's case.[68]

These issues have often been resolved adversely to the defendant. Traditionally, only detriment to the defendant's ability to mount a defense, such as a lost witness, was considered constitutionally prejudicial.[69] However, in *United States v. Ewell*,[70] the Supreme Court recognized certain other sources of prejudice: pre-trial incarceration, or, if the defendant was released on bond, restraints on his liberty, and the hostility and suspicion of the community.[71] *Barker* explicitly re-emphasized these factors as legitimate elements of prejudice,[72] and suggested that they could be measured by the quantity and quality of defendant's

65 407 U.S. at 531.

66 *Id.* at 534-36.

67 *See* notes 69-75 and accompanying text *infra*.

68 *See* notes 76-81 and accompanying text *infra*.

69 King v. United States, 265 F.2d 567, 570 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959) (hardship not sufficient showing of prejudice without specific prejudice to defense); United States v. Verville, 281 F. Supp. 591, 593 (E.D. Wis. 1968) (only detriment to defense's case prejudicial in the constitutional sense).

70 383 U.S. 116 (1966).

71 This guarantee [speedy trial] is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.

Id. at 120.

72 In *Barker* the Court also emphasized the prejudice to society which stems from excessive delay. Specifically, trial delay encourages plea-bargaining and undermines rehabilitation of the criminal after he is convicted. If the defendant is released on bond, he may commit other crimes or jump bail. If he must await trial in jail, the cost is even greater; in addition to the direct cost of maintaining prisons and the indirect cost of increased social welfare to dependents, trial delay may have a destructive effect on the defendant's character, particularly when he has not yet been convicted. 407 U.S. at 519-21.

assertion of the right as well as by direct evidence.[73] However, the Court added the caveat that impairment of the defendant's substantive defense remains the most serious type of prejudice.[74]

The secondary status of prejudice which does not impair the defendant's substantive defense is confirmed by the Court's analysis of Barker's own claim. The Court found that although Barker spent ten months in jail and was on bail for more than four years prior to trial, the resultant prejudice to him was "minimal" because he did not allege the loss of any witness and losses of memory were minor.[75] This treatment makes it difficult to conceive of circumstances where personal prejudice, not coupled with a claim of substantial impairment to the defense, might alone be sufficient to establish a claim of prejudice.

Allocation of the burden of proof can also be crucial to, even determinative of, the issue of prejudice. There are obvious difficulties in establishing that a witness's memory has faded or in proving that the loss of one's job was a result of a pending indictment.[76] Although proof of prejudice has usually been considered an element of the defendant's case,[77] some courts have shifted the burden to the government in cases of extreme delay.[78] This second view is more consistent with the state's affirmative duty to bring the defendant to trial.[79] It follows that where undue delay has occurred, the state should have the burden of proving that the defendant has not suffered from its failure to discharge this duty.

---

73 *See* notes 63-66 and accompanying text *supra.*

74 407 U.S. at 532.

75 *Id.* at 534.

76 *See, e.g.,* Bynum v. United States, 408 F.2d 1207 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 935 (1969) (lack of proof of prejudice held to defeat speedy trial claim despite prima facie showing of undue delay).

The *Barker* opinion also recognizes the practical problems of proof: "There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. at 532. The Court's solution was to permit extrinsic evidence, such as the frequency and force of defendant's objections, to serve as a substitute for direct evidence on this point. *See generally* notes 65-66 and accompanying text *supra.*

77 *See* United States v. Ewell, 383 U.S. 116, 122-23 (1966); United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620, 624 (2d Cir. 1963). *Contra,* United States v. Lustman, 258 F.2d 475 (2d Cir.), *cert. denied,* 358 U.S. 880 (1958). In *Lustman* the court held that "a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment." 258 F.2d at 478.

78 United States v. Chase, 135 F. Supp. 230 (N.D. Ill. 1955) (21 year delay); Petition of Provoo, 17 F.R.D. 183 (D. Md.), *aff'd mem.,* 350 U.S. 857 (1955) (six year delay). *Contra,* United States *ex rel.* Pierce v. Lane, 302 F.2d 38 (7th Cir. 1962) (prejudice not presumed from 18 year delay).

79 *See* Note, *supra* note 28, 20 STAN. L. REV. at 493-97.

The Court's position in *Barker* on the burden of proof issue is far from explicit. By characterizing delay sufficient to support a speedy trial claim as "presumptively prejudicial,"[80] it appears to sanction the placing of this burden on the government. Subsequent language, however, although not necessarily inconsistent with this view, tends to suggest the opposite conclusion.[81]

II

COLLATERAL ISSUES CONSIDERED IN *Barker*

The *Barker* opinion implicitly decided two other points of law relating to speedy trial. First, by applying sixth amendment criteria to Barker, who was convicted by a Kentucky state court in 1963,[82] the Court necessarily gave retroactive effect to *Klopfer v. North Carolina*,[83] the 1967 case which imposed this sixth amendment obligation on the states.[84]

Second, in its discussion of a possible remedy, the Court stated that the denial of a speedy trial

> [l]eads to the unsatisfactorily severe remedy of dismissal of the indictment . . . . This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.[85]

This language strongly implies that dismissal of an indictment or reversal of a conviction on speedy trial grounds bars subsequent re-indict-

---

80 407 U.S. at 530.

81 In finding the prejudice to *Barker* to be "minimal," the Court emphasized that there was no claim that any of his witnesses had died or otherwise become unavailable. *Id.* at 534. This strongly suggests that a defendant has at least the obligation to plead the circumstances of any detriment to his substantive defense. This language can be read consistently with the presumption of prejudice, however, by separating the burden of pleading from the burden of proof. Once a defendant has raised the issue of prejudice, it would become the duty of the prosecution to prove that substantial prejudice had not in fact occurred. Such an approach has substantial merit in that it requires the defendant, who has unique knowledge of the prejudice he has in fact suffered, to frame this issue. At the same time, it does not place on him the harsh burden of proving prejudice which it was beyond his control to prevent.

82 Barker v. Wingo, 442 F.2d 1141, 1142 (6th Cir. 1971).

83 386 U.S. 213 (1967).

84 *Klopfer* itself did not consider the issue of retroactivity. *See also* Dickey v. Florida, 398 U.S. 30, 39 (1970).

85 407 U.S. at 522 (footnote omitted).

ment for the same offense, a point on which there has been some conflict of authority.[86]

III

CONSIDERATIONS UNDERLYING THE OPINION

The "criteria" for determining speedy trial claims promulgated in *Barker* are quite nebulous.[87] The practical effect of the case, except in those jurisdictions strictly adhering to the demand-waiver rule,[88] is to place the Court's imprimatur on virtually every speedy trial test now in use. Some of the underlying considerations which influenced the Court to adopt this approach are suggested by its discussion of the unique characteristics of the right to speedy trial.[89]

Justice Powell, speaking for the Court, identified three "generic differences" between speedy trial and other constitutional protections afforded the accused. One of these is that delay often works to the benefit of the accused.[90] This, of course, is the classic rationale for the demand-waiver rule,[91] and undoubtedly influenced the Court's decision to retain defendant's assertion of the right as a factor to be weighed in evaluating his claim, even though the waiver effect has been eliminated.[92] Although this view of demand has validity in instances of defense-caused delay, it does not meet Justice Brennan's contention in *Dickey* that a defendant should not suffer where his only contribution to the delay was failure to object.[93] The Court also implied that demand is relevant to the issue of prejudice.[94] The Court concluded that since the net consequence of delay may be a benefit to the defendant, denial of the speedy trial right cannot be deemed prejudicial to the defendant as a matter of law.[95] This reasoning is not entirely persuasive. Although the prosecution's case can undoubtedly be weakened by delay, it does not follow that this should diminish the legal effect of prejudice to the

86 *See* Mann v. United States, 304 F.2d 394 (D.C. Cir. 1962); People v. Hernandez, 250 Cal. App. 2d 842, 58 Cal. Rptr. 835 (1967) (reindictment not barred). *But see* People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955).

87 A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis.

88 *See* notes 53-54 and accompanying text *supra.*

89 407 U.S. at 519-22.

90 *Id.* at 521.

91 *See* notes 55-59 and accompanying text *supra.*

92 *See* notes 60-62 and accompanying text *supra.*

93 *See* text accompanying note 59 *supra.*

94 407 U.S. at 521.

95 *Id.*

defendant where the defendant has not caused the delay. The Court overlooks situations in which the state has ultimate control over the means of preventing the delay.[96]

Another unique aspect of the right to a speedy trial is its relative vagueness when compared with other procedural rights.[97] It is difficult to determine the point at which the right is denied in a given case, let alone to promulgate a rule which will do justice in all future cases.[98] Furthermore, a speedy trial may at times be antagonistic to other constitutional protections in a criminal justice system where deliberation and procedural safeguards are highly prized. Indeed, some have sought to use the right to a speedy trial as justification for an attack on other constitutional safeguards for the accused.[99] The latitude which *Barker* allows reviewing courts evaluating speedy trial claims is a manifestation of the inherent vagueness of the right.

This unique feature of the right may have caused the Court's failure to act more affirmatively in the area of length of delay, although the Court assigned limits on its constitutional power as the reason.[100] A rule such as that embraced by the District of Columbia Circuit, which considers speedy trial claims based on more than a year's delay to have prima facie, though rebuttable, merit,[101] would be particularly useful in jurisdictions which have not established specific time limits through speedy trial statutes or court rules. Yet the Supreme Court insisted on keeping the time limit totally dependent on the merits of each particular case.

The deprivation of the right of a speedy trial requires a more drastic remedy than does denial of other procedural rights, and it is obvious that the Court is deeply concerned with this problem.[102] While other procedural defects can be corrected at a new trial, denial of

---

96 *See* notes 79-81 and accompanying text *supra*.

97 407 U.S. at 521.

98 *Id.*

99 For example, in Senate hearings on a proposed speedy trial bill, Assistant Attorney General, now Supreme Court Justice, William H. Rehnquist testified that the Department of Justice's approval of the bill was conditioned on the enactment of "additional provisions directed towards the attainment of the end of prompt dispensation we all seek." *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 107 (1971). His specific suggestions included a statutory modification of the exclusionary rule (*id.* at 107-08), and bar of post-conviction claims based on *Miranda*. *Id.* at 107-14.

100 *See* text accompanying note 36 *supra*.

101 Hedgepeth v. United States, 364 F.2d 684, 686 (D.C. Cir. 1966). *Accord*, Harling v. United States, 401 F.2d 392 (D.C. Cir.), *cert. denied*, 393 U.S. 1068 (1969).

102 407 U.S. at 522.

a speedy trial requires that the defendant go free without being tried.[103] The Court's explicit characterization of the necessary remedy as "unsatisfactorily severe"[104] suggests that this consideration may have influenced the Court to refrain from announcing a constitutional rule which might exceed the capacity, or willingness, of some states to implement.[105]

An additional generic difference between the right to a speedy trial and an accused's other constitutional protections is the existence of a societal interest in enforcing the right "which exists separate from and at times in opposition to the interests of the accused."[106] Although all such rights are supported by a general concern that criminal defendants be treated fairly, speedy trial protects other, more concrete public interests as well. Effective enforcement of the speedy trial right might minimize the effectiveness of a defendant's efforts to plea bargain, and would reduce his opportunity to commit other crimes while free on bond.[107] Further, although the point was not mentioned by the Court in *Barker*, effective enforcement of the right would greatly diminish the force of arguments for preventive detention.[108]

---

103 *Id.* *See* notes 85-86 and accompanying text *supra*.

The Court did not discuss another recognized remedy for denial of the right of speedy trial—the writ of mandamus to compel trial. Prior to 1938, a number of courts considered this the only remedy for denial of the right:

> [W]e think an accused would not be entitled to a discharge even though he were denied a speedy trial within the meaning of the Constitution. His right and only remedy would be to apply to the proper appellate court for a writ of mandamus to compel trial.

Frankel v. Woodrough, 7 F.2d 796, 798 (8th Cir. 1925) (dictum). *But see* MacKnight v. United States, 263 F. 832 (1st Cir. 1920). However, this remedy has fallen into disuse with the advent of the federal rule which provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

FED. R. CRIM. P. 48(b).

104 407 U.S. at 522.

105 If the Court had adopted a more affirmative stance in *Barker*, this concern might have been ameliorated by an appropriate delay in implementation. Any major broadening of constitutional rights necessarily entails adjustment on the part of the instrumentalities of government charged with their enforcement. The Court has often attempted to cushion this dislocation in its consideration of remedy. For example, the rule announced in Miranda v. Arizona, 384 U.S. 436 (1966), was held to apply only to trials beginning after June 13, 1966. The Second Circuit followed a similar approach with its speedy trial rules, delaying their enforcement for six months to give the government time to develop and implement procedures for compliance. 2D CIR. RULES REGARDING THE PROMPT DISPOSITION OF CRIM. CASES.

106 407 U.S. at 519.

107 *Id.* at 519-21. *See* note 72 *supra*.

108 *See* Note, *supra* note 33, at 824.

However, it is this societal interest which is least served by the factors developed in the *Barker* opinion. For example, although noting that the drastic action of dismissal is the "only possible remedy"[109] for the denial of a speedy trial, the Court conditioned the availability of this remedy on the "defendant's assertion of the right."[110] The right was so conditioned despite the Court's recognition that defendants as a class usually welcome delay,[111] and that society's interest in speedy trial may work "in opposition to the interests of the accused."[112]

CONCLUSION

The Court in *Barker* announced that it had placed "the primary burden on the courts and the prosecutors to assure that cases are brought to trial."[113] However, the Court failed in several important respects to take the steps necessary to achieve this objective.[114]

If *Barker* can be read primarily as a recognition of the constitutional importance of a speedy trial and as an encouragement to the states to develop individual plans to implement the speedy trial guarantee, the Court's refusal to pre-empt state initiative by mandating a precise, constitutional plan has substantial merit. But this interpretation imposes a continuing obligation on the Court. Should the states fail to act within a reasonable time, the Court should be prepared to intervene. And should state legislative abdication be accompanied by a failure to provide sufficient judicial resources for the administration of criminal justice, intervention may include the imposition of mechanisms to overcome the greatest practical bar to full realization of the speedy trial right—court congestion.[115] If, on the

109 407 U.S. at 522.

110 *Id.* at 531-32. *See* notes 60-66 and accompanying text *supra.*

111 407 U.S. at 521.

112 *Id.* at 519. Similarly, the emphasis on prejudice to the defendant obscures the equally important, and independent, sources of prejudice to society when the right is denied. *See* text accompanying note 115 *infra.*

113 407 U.S. at 529.

114 *See* notes 36-37, 48-52, 77-81 and accompanying text *supra.*

115 There is a small but growing body of precedent for the proposition that courts have the power to compel adequate financing for their operations where the legislative branch has failed to provide it. For example, the Pennsylvania Supreme Court in 1971 upheld a mandamus proceeding by a Philadelphia common pleas court to compel city officials to allocate additional funds for the administration of the court. Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 274 A.2d 193, *cert. denied,* 402 U.S. 974 (1971). *See* Note, *supra* note 33, at 820; *cf.* Note, *Judicial Financial Autonomy and Inherent Power,* 57 CORNELL L. REV. 975 (1972).

The United States Supreme Court has also recognized the problem: "Delay, for ex-

other hand, *Barker* stands for the proposition that the right to a speedy trial must ultimately depend on demand and prejudice to the defendant, then the case may be properly criticized for failing to provide adequate protection for this fundamental right.

Charles P. Schropp

ample, may spring from a refusal by other branches of government to provide . . . the judiciary with the resources necessary for speedy trials." Dickey v. Florida, 398 U.S. 30, 51 (1970) (concurring opinion). However, the Court's ultimate solution to the problem remains to be determined.

International Law—Commercial Contracts—Enforcing Choice of Forum and Exculpatory Clauses

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)

In both domestic and international transactions, the contracting parties often designate a particular forum in which all disputes between them are to be adjudicated. Once a dispute arises, however, the aggrieved party frequently disregards the choice of forum clause[1] and brings suit in a different jurisdiction. When the defendant pleads the choice of forum clause as a jurisdictional defect, the court is faced with the need to determine the clause's validity. On this issue the courts are divided. Some view the choice of forum agreement as an attempt by the parties to deprive the court of its jurisdiction.[2] These courts consider the choice of forum clause invalid per se as against public policy.[3] On the other hand, a growing number of jurisdictions treat the choice of forum clause as within the contractual capacity of the parties and thus hold it void only if it is unreasonable.[4] These courts measure the

1 No attempt is made herein to distinguish choice of forum agreements made prior to a controversy from agreements made after a cause of action has accrued.

2 *See, e.g.*, Carbon Black Export, Inc. v. SS Monrosa, 254 F.2d 297, 300 (5th Cir.), *cert. granted*, 358 U.S. 809 (1958), *cert. dismissed*, 359 U.S. 180 (1959); Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941 (2d Cir. 1930); Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916); Kyler v. United States Trotting Ass'n, 12 App. Div. 2d 874, 219 N.Y.S.2d 25, *appeal denied*, 12 App. Div. 2d 1004, 212 N.Y.S.2d 1022 (4th Dep't 1961).

3 The public policy considerations underlying judicial reluctance to honor choice of forum agreements were first discussed in a pair of early Massachusetts cases. In Nute v. Hamilton Mutual Ins. Co., 72 Mass. (6 Gray) 174 (1856), the Massachusetts Supreme Court determined that the plaintiff's choice of forum is a matter inextricably bound to the concept of remedy. While willing to concede that the contracting parties had the power to regulate certain areas of controversy, the court held that any "remedial issues" were matters of law and, as such, remained exclusively within the province of the judiciary. The parties created and maintained contractual rights between them, but upon breach only the courts could enforce those rights. *Id.* at 180. The law was viewed as transcending the will of the contracting parties. Even though their agreement was ended by breach, the court would be able to provide a remedy for the injured party. *Id.* In a companion case, Hall v. People's Mutual Fire Ins. Co., 72 Mass. (6 Gray) 185 (1856), the same court stated its ruling more succinctly. Noting the well-settled doctrine that parties cannot, by their consent, give the court jurisdiction where the law has not given it, the Massachusetts tribunal reasoned that the parties could not take away jurisdiction where the law has given it. *Id.* at 192.

4 *See, e.g.*, Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965).

This approach to the choice of forum clause problem began to emerge at the turn of the century. In 1903, the Supreme Court of Massachusetts, in Mittenthal v. Mascagui, 183 Mass. 19, 66 N.E. 425 (1903), held that a stipulation in a contract giving the Italian

unreasonableness of the clause by the degree to which its enforcement would impair the plaintiff's ability to pursue his cause of action.[5]

When the action is brought in a forum other than that designated in the contract, the theory applied in a forum-selecting clause controversy is crucial. In an invalid per se jurisdiction the choice of forum agreement will be ignored and the question of venue will be decided on grounds of forum non conveniens, thus placing a burden on the defendant to show that the plaintiff's choice of forum is unreasonable. Unless the evidence is strongly in the defendant's favor, the plaintiff's selection will rarely be disturbed.[6] In a jurisdiction in which the clause is void only if unreasonable, great weight will be given to the agreement of the contracting parties and the plaintiff will be compelled to show that the forum designated in the contract is unreasonable.[7] These courts will recognize jurisdiction over the controversy but may properly decline to exercise jurisdiction on the ground that the clause is

courts exclusive jurisdiction over all disputes was not so objectionable on grounds of public policy that the court would refuse to enforce it. The contract in question, however, was between two Italian citizens, and was to be performed partly in Italy and partly in the United States. The later Massachusetts case of Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916), emphasized these peculiar facts of the *Mittenthal* case and limited its effectiveness as precedent. Although the development of the "reasonableness" test was slowed by *Nashua River, Mittenthal* had put a chink in the "invalid per se" armor which would later prove significant.

That significance was first felt in 1949 when Chief Judge Learned Hand, citing *Mittenthal*, noted in Krenger v. Pennsylvania R.R., 174 F.2d 556, 561 (2d Cir. 1949) (concurring opinion), that there was no longer an uncompromising condemnation of forum clauses per se, but rather that such agreements were invalid only if unreasonable. The Chief Judge was forced to confess, however, that judicial hostility toward forum clauses still existed. Parenthetically it can be noted that Judge Hand's remarks in *Krenger* came at a time when greater emphasis was being placed on the parties' right to contract. Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903), which Hand cites, stated specifically that the modern trend was to permit greater freedom to contracting parties in matters which formerly were off limits to them. *Id.* at 23, 66 N.E. at 426.

The influence of Judge Hand's thinking affected the development of the "void only if unreasonable" doctrine. Courts began to cite his observation as the moderu analysis. *See, e.g.*, Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 808 (2d Cir. 1955) (quoting Hand's analysis); Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965):

> The modern and correct rule is that, while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.

5 Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965).

6 *E.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

7 *E.g.*, Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 134, 209 A.2d 810, 816 (1965).

reasonable and should be upheld.[8] Because substantial contacts frequently exist with both forums, it is normally impossible for either party to prove a forum unreasonable. Thus, depending upon the theory applied, one of the litigants will escape the burden of proof and, as a practical matter, will prevail on the question of proper forum.

Partisans of each theory claim the "correctness"[9] or "universal acceptance"[10] of their own view. The result has been confusion. Thus, when the Second Circuit utilized the reasonableness test in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*,[11] and the Fifth Circuit adopted the per se rule in *Carbon Black Export, Inc. v. SS Monrosa*,[12] it became evident that the Supreme Court would ultimately be called on to resolve the controversy. The Supreme Court finally faced the issue in *M/S Bremen v. Zapata Off-Shore Co.*[13]

I

Background and Basic Rationale of *Zapata*

Zapata, an American corporation specializing in off-shore oil drilling, contracted with Unterweser, a German corporation and owner of a deep sea tug, the *Bremen*.[14] Under the terms of the contract, the *Bremen* was to tow Zapata's ocean-going drilling rig from Louisiana to the Adriatic Sea, where Zapata had agreed to drill certain wells. The contract provided that any dispute was to be brought before the London Court of Justice.[15] In addition to the choice of forum clause, the contract included two exculpatory clauses relieving Unterweser from liability for damages to the towed drilling rig.[16] On January 5, 1968, the

8 Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 808 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955).

9 Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965).

10 Carbon Black Export, Inc. v. SS Monrosa, 254 F.2d 297, 300 (5th Cir.), *cert. granted*, 358 U.S. 809 (1958), *cert. dismissed*, 359 U.S. 180 (1959).

11 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955).

12 254 F.2d 297 (5th Cir.), *cert. granted*, 358 U.S. 809 (1958), *cert. dismissed*, 359 U.S. 180 (1959).

13 407 U.S. 1 (1972), *vacating and remanding In re* Unterweser Reederei GmbH, 446 F.2d 907 (5th Cir. 1971), *aff'g on rehearing per curiam* 428 F.2d 888 (5th Cir. 1970), *aff'g* 296 F. Supp. 733 (M.D. Fla. 1969).

14 407 U.S. at 2.

15 *Id.* The High Court of Justice in London is a neutral forum with much experience in admiralty litigation. *Id.* at 12.

16 The general conditions of the contract included provisions that Unterweser and its agents were "not responsible for defaults and/or errors in the navigation of the tow" and that any damages to the drilling rig would be "in any case for account of its Owners." *Id.* at 3 n.2.

Bremen departed for Italy with the rig in tow. When the craft reached the international waters of the Gulf of Mexico, a severe storm arose. Mounting waves caused the rig to roll sharply, damaging it extensively. Zapata instructed the *Bremen* to tow its damaged equipment to Tampa, Florida, the nearest port of refuge. Upon her arrival in Tampa, the tug was immediately arrested by a United States marshal, acting pursuant to a complaint filed by Zapata.[17] The complaint, the filing of which was itself a breach of the contract's choice of forum clause, alleged both negligent towage and breach of contract.

In its defense, Unterweser pleaded the choice of forum clause, and asked the district court to dismiss the action for lack of jurisdiction or on forum non conveniens grounds. In the alternative, Unterweser sought a stay of the action pending submission of the dispute to the London Court of Justice.[18] On July 29, 1968, in an unreported opinion, the district court denied Unterweser's motions.[19] The court held the choice of forum clause to be invalid per se.[20] Analyzing the motion to dismiss along traditional forum non conveniens lines, the court concluded that the balance of convenience was not so strongly in favor of Unterweser that Zapata's choice of forum should be disturbed. From the date on which it received notice of the claim, Unterweser had six months to file for a limitation on its liability in the affair.[21] On July 2, 1968, ten days before the end of the six months, while still awaiting a decision on its motions, Unterweser was forced to file such a limitation action in the Florida district court. Simultaneously, Unterweser moved to stay the limitation proceedings. Consistent with its earlier unreported decision, the district court, on January 21, 1969, denied Unterweser's motion for a stay in the limitation action.[22] The Court of Appeals affirmed,[23] over a strong dissent by Judge Wisdom.[24]

---

17 The complaint was directed at both Unterweser in personam and the *Bremen* in rem. Pursuant to 28 U.S.C. § 2464(c) (1970), the *Bremen* was released from custody when Unterweser furnished security in the sum of $3,500,000, the amount claimed by Zapata in the libel action.

18 Shortly after Zapata filed its action in the district court and in line with its theory that the choice of forum clause controlled, Unterweser instituted an action against Zapata in the High Court of Justice in London. In the suit Unterweser claimed damages for Zapata's breach of contract in disregarding the choice of forum clause and sought other money due it under the contract.

19 *In re* Unterweser Reederei GmbH, Civ. No. 21 (M.D. Fla. July 29, 1968).

20 For a discussion by Chief Justice Burger of the unreported district court opinion, see 407 U.S. at 6.

21 46 U.S.C. § 185 (1970).

22 296 F. Supp. at 736. In the limitation proceeding, the district court granted Zapata's motion to restrain Unterweser from further litigation in London and denied a second attempt by Unterweser to gain a stay in the Florida proceedings. The decision to deny the motion for a stay was on essentially the same grounds as in the unreported opinion,

The Supreme Court vacated the Fifth Circuit judgment and remanded, stating that the Court of Appeals had given "far too little weight" to the choice of forum clause.[25] Chief Justice Burger, writing for the Court, embraced the "void only if unreasonable" test for choice of forum agreements and posited it as the doctrine to be followed by federal courts sitting in admiralty.[26] Pointing out that the *Bremen* and her tow were to traverse the waters of many jurisdictions and might have been forced to stop at several ports of refuge, the Court observed that it was reasonable for the parties to have attempted to fix a mutually agreeable jurisdiction to handle their disputes.[27] The majority of the Court viewed the elimination of this uncertainty as an integral part of an international contract.[28] Consequently, the Court placed the burden on the party seeking to escape the choice of forum agreement, Zapata, to show that trial in the contractually designated forum would for all practical purposes deprive it of its day in court.[29] Otherwise, in the absence of "fraud, undue influence, or overweening bargaining power," the contracting parties would be held to their bargain.[30]

The Court recognized Zapata's contention that the English courts would hold the exculpatory clauses in the contract prima facie valid and enforceable.[31] Although this type of clause had been considered

---

but with the additional justification that since Unterweser had invoked the American court's jurisdiction to obtain the benefit of the Limitation Act, it could not now deny that jurisdiction. For a discussion of this point, see 39 U. CIN. L. REV. 819 (1970).

23 *In re* Unterweser Reederei GmbH, 428 F.2d 888 (1970), *aff'd on rehearing per curiam*, 446 F.2d 907 (5th Cir. 1971).

24 Judge Wisdom in his dissent analogizes the development of the judicial attitude toward choice of forum clauses and the treatment accorded arbitration agreements. 428 F.2d at 899. At one time arbitration clauses were also considered void as against public policy. *See* United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915). Today, however, arbitration agreements are enforced like any other contract provision. *See, e.g.*, Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931). The rapid change in this area can be attributed largely to the enactment of statutes dealing with the enforceability of arbitration agreements. *See, e.g.*, Federal Arbitration Act, § 1, 9 U.S.C. § 2 (1970); N.Y. CIV. PRAC. LAW § 7501 (McKinney 1963).

25 407 U.S. at 8.

26 *Id.* at 10.

27 Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the *Bremen* or Unterweser might happen to be found.

Id. at 13. This language and the court's treatment of the subject strongly suggest an analogy between choice of forum clauses and stipulated damage provisions.

28 *Id.* at 13-14.

29 *Id.* at 18.

30 *Id.* The Court found none of these factors in the *Zapata* facts. *See id.* at 12 nn.14 & 15.

31 *Id.* at 8 n.8.

contrary to public policy by the Supreme Court itself in similar cases,[32] the Court was willing to decline jurisdiction and to allow the litigants to proceed in London, thereby subjecting the American corporation to judgment on the exculpatory clauses. The Court did not overrule its earlier decisions on the validity of the exculpatory clauses, but instead classified the contract in question as an "international commercial agreement" and as such not governed by prior rulings.[33]

II

Potential Effects of *Zapata*

The Court in *Zapata* held that a choice of forum clause in an international commercial agreement will be enforced by a federal court sitting in admiralty unless the forum agreement is shown to be unreasonable by the resisting party.[34] Although limited to suits on international commercial agreements brought in admiralty, the decision cannot fail to have an impact on the future treatment of other types of international contracts. The majority contended that if the future development of American international trade is to be facilitated, courts must not insist that dealings be made exclusively on American terms, governed by American laws, or resolved in American courts,[35] and condemned such an attitude as "parochial."[36] This rationale applies equally well to those international disputes which do not fall within the court's admiralty jurisdiction. Indeed, the Court implied that all international commercial agreements are deserving of legal treatment different from that accorded wholly domestic dealings.[37] While the Court may have been reluctant to hand down a rule broader than that necessitated by the controversy before it, the influence of the present decision will probably not be confined to admiralty. The ultimate fairness of the *Zapata* test, which requires both the reasonableness of the choice of forum and the absence of fraud, undue influence, or overweening bargaining power between the parties, would justify its application in any case involving a private international agreement.

It is easier to predict that the *Zapata* ruling will not be limited to admiralty cases than it is to define clearly the extent and nature of its

32 Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

33 407 U.S. at 16.

34 *Id.* at 10.

35 *Id.* at 9.

36 *Id.*

37 *Id.*

potential effect. This note will discuss *Zapata's* role in the rapidly developing body of American international law. More specifically, since the choice of forum clause issue has been litigated several times previously[38] in controversies governed by the Carriage of Goods by Sea Act (COGSA),[39] the note will deal with *Zapata's* possible effect on international cases falling within this statute.

A. Zapata *as a Liberalizing Influence on the Judicial Treatment of International Contracts*

Zapata suggests that in the future the Supreme Court will be likely to take a more favorable view of any reasonable contract provision found in an international commercial agreement. Commercial considerations will force a re-evaluation of those contractual terms which have always been considered taboo in domestic agreements.[40] The Court in *Zapata* noted that the expansion of American business and industry would hardly be encouraged if, notwithstanding formal contracts, the courts insisted that all disputes involving Americans be resolved under American laws and in American courts.[41] Any international contract is necessarily a compromise of two different jurisprudential outlooks.[42] As a result, the Court enforced the choice of forum clause and found that the public policy considerations voiding exculpatory clauses in domestic contracts did not apply to the international agreement in *Zapata*.[43] Both choice of forum and exculpatory clauses would be upheld in certain foreign tribunals,[44] and their enforcement by the Court in *Zapata* can be attributed to a compromise dictated by commercial considerations.[45]

---

38 *See* notes 52-57 and accompanying text *infra*.

39 46 U.S.C. §§ 1300-15 (1970).

40 *See* text accompanying notes 35-37 *supra*. For example, in *Zapata* the Court was willing to enforce indirectly the exculpatory clauses which it had formerly held void as against public policy in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

41 407 U.S. at 9, 11-12.

42 "We cannot have trade and commerce in world markets and international waters exclusively on our terms governed by our laws, and resolved in our courts." *Id.* at 9.

43 *Id.* at 15-16.

44 *Id.* at 8 & n.8, 10-11 & n.12.

45 "Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15.

The view that the *Zapata* decision may signal a new laissez-faire attitude toward international contracts is reinforced by the Supreme Court's view that the case is related to National Equip. Rental Ltd. v. Szukhent, 375 U.S. 311 (1964). *See* 407 U.S. at 10. This links *Zapata* with the progressive attitude of the Court toward in personam adjudicatory authority. *Szukhent* held that the federal courts must permit a party to designate by contract an agent for receipt of process in a jurisdiction where otherwise the party could not be served. The Court premised the expansion of the scope of state jurisdiction

In deciding to enforce the choice of forum clause, the Court found that policy considerations which would void exculpatory clauses in a domestic agreement were inapplicable to the *Zapata* situation. By forcing the parties to litigate in England, the Court ensured the eventual enforcement of the exculpatory clauses. This indirect enforcement of the exculpatory provisions may indicate the Court's willingness to enforce such clauses directly in future cases involving international commercial contracts. Similarly, when other policy considerations of a particular jurisdiction which limit the rights of international contractors are re-examined, the Court may place greater weight on the agreement of the parties. If the *Zapata* safegnards are met, the Court is likely to enforce the clause in question.[46]

B. Zapata *and COGSA*

Although the *Zapata* decision may provide a new freedom for American citizens engaged in international dealings,[47] the effect of

---

over foreign corporations and other nonresidents largely on the transformation of the national economy. Nationalization of the economy has effaced the economic significance of state lines, and modern "facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other states." Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 442-43, 176 N.E.2d 761, 766 (1961). This same rationale lies at the root of *Zapata*:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so.

407 U.S. at 8. The commercial and practical considerations which induced the Court to overturn a long-standing aud universally accepted domestic rule of jurisdiction in International Shoe Co. v. Washington, 326 U.S. 310 (1945), may portend a similar liberalization in the international contract area.

Because the disposition of a choice of forum clause question involves a determination of jurisdiction, it could be argued that the Court's reference to *Szukhent* merely stands for the jurisdictional proposition that choice of forum agreements are valid if reasonable. The Court, however, was not content with a strictly legal analysis of the problem; it placed much emphasis ou policy considerations relevant to America's commercial growth. 407 U.S. at 8-9. In additiou, the dispatch with which the Court treats the exculpatory clause argument indicates that the Court referred to *Szukhent* not only for its content but also for the spirit of change it represents. The *Zapata* opinion could not be confined to a narrow discussion of the relative merits of choice of forum agreements because haunting every argument was the spectre of the exculpatory clauses. The Court, which had the opportunity to rule on the choice of forum issue in *Carbon Black* free of this burden, chose instead to assert the validity of the choice of forum clause in *Zapata*, where the exculpatory clause issue militated against the Court's ultimate finding.

[46] The Court has acknowledged that it cannot always expect international agreements to be decided under American law. *See* note 42 and accompanying text *supra*. It would seem, then, that a contract which contains provisions unpopular in American law but quite acceptable in the tradition of the foreign party's law should be judged under the foreign law's "traditional notions of fair play and substantial justice."

[47] Presumably, an American citizen who wishes to have Italian law govern his contract could provide for this with any party other than another American. *See* 407 U.S. at 17.

Zapata could be minimal in those areas of international commerce which are regulated by Congress. For example, COGSA defines the responsibilities and liabilities of the parties to an international carriage contract.[48] COGSA applies to every bill of lading evidencing "a contract for the carriage of goods by sea to or from ports of the United States."[49] One provision of the Act declares that exculpatory agreements in the contract between the carrier and the shipper are to be considered void.[50] Chief Justice Burger noted without comment that COGSA was not applicable to *Zapata*,[51] although it had affected the controversies in *Muller*,[52] *Carbon Black*,[53] and *Indussa Corp. v. SS Ranborg*.[54] The *Muller* court reasoned that if Congress had intended forum agreements to be void under COGSA it would have voided them specifically,[55] and declined to rule that the cost of litigation in a foreign forum would bring the contract within the COGSA ban on exculpatory agreements.[56] Later, in *Indussa*, the Second Circuit overruled its holding in *Muller*. Applying COGSA to a similar situation, it held that the costs of litigation did indeed lessen liability within the statute's meaning.[57] *Zapata* suggests that the Supreme Court may be ready to reinstate the *Muller* reasoning.

---

48 46 U.S.C. §§ 1300-15 (1970).

49 *Id.* § 1300.

50 Any . . . agreement in a contract of carriage relieving the carrier or the ship from liability . . . arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability . . . shall be null and void and of no effect.

Id. § 1303(8). By enforcing the choice of forum clause in *Zapata* (supposing COGSA to apply), the court would be indirectly enforcing the exculpatory clauses proscribed in § 1303(3). For further discussions of COGSA and choice of forum clauses, see Note, *Ocean Bills of Lading and Some Problems of Conflict of Laws*, 58 COLUM. L. REV. 212 (1958), and 14 WAYNE L. REV. 609 (1968).

51 407 U.S. at 10 n.11. Although neither the Supreme Court nor the inferior courts stated why COGSA was not applicable, it is apparent that the contract in question would at least come under the exception defined in 46 U.S.C. § 1306 (1970), which states that extraordinary circumstances surrounding the performance of the contract would exempt the parties from the COGSA limitations. Such special conditions serve to free the contractors to agree on any terms allocating liability, as long as the agreement is set forth in non-negotiable form.

52 Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955).

53 Carbon Black Export, Inc. v. SS Monrosa, 254 F.2d 297 (5th Cir.), *cert. granted*, 358 U.S. 809 (1958), *cert. dismissed*, 359 U.S. 180 (1959).

54 377 F.2d 200, 202 (2d Cir. 1967).

55 224 F.2d at 807. The Court contrasted the COGSA provision with a comparable Australian statute. *Id. See* Sea-Carriage of Goods Act of 1924, § 9(1), IV Commonwealth Acts 1901-1950, at 3921, 3922 (Australia 1953).

56 224 F.2d at 807. *See* note 50 *supra*.

57 377 F.2d at 202.

While the Court might generally tend to follow *Muller* and overlook the costs of foreign litigation in determining what is proscribed by COGSA, a different case is presented where the contract contains specific exculpatory clauses. In this situation the reasoning of Justice Douglas, the lone dissenter in *Zapata*, would have additional force. Douglas felt that the stratagem of specifying a foreign forum in order to escape local policy was the same as invoking a foreign law of construction, except that the former plan added the expense of foreign litigation.[58] Indeed, the majority in *Zapata* states that a choice of forum clause would be unenforceable if it contravened a strong public policy of the forum deciding its validity.[59] Thus, if *Zapata* had been a COGSA case, the Act's stated policy voiding exculpatory clauses might have forced the Court to negate the choice of forum agreement.

On the other hand, Chief Justice Burger's opinion indicates the Supreme Court's strong concern for the direction of American jurisprudence in the international area. Having held in *Zapata* that the rationale for voiding exculpatory clauses does not apply to foreign transactions, in a future *Zapata*-type case covered by COGSA, the Court may be unwilling to follow the exculpatory clause provision in COGSA unless it is sure that Congress intended enforcement of the COGSA prohibition under such circumstances. In the Court's view, the question faced on appeal in *Zapata* was whether the district court should have exercised its jurisdiction by addressing issues beyond the expectations of the parties under the choice of forum clause.[60] The posture of that question suggests that if the Court can satisfy itself that there was no fraud, undue influence, or overweening bargaining power and that the party resisting would still have a day in court, the controversy would be dismissed in favor of the designated foreign tribunal. No consideration would be given the question of other contract terms, as, for example, exculpatory clauses, which might be contrary to COGSA. This treatment would result, however, only if the Court could convince itself that the ban on exculpatory clauses found in COGSA was not mandated in a choice of forum-exculpatory clause situation.[61] As

58 407 U.S. at 24 n.*.

59 *Id.* at 15.

60 *Id.* at 12.

61 *Zapata* may indicate that the Court is so inclined, and the disposition of arbitration agreements under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, 201-08 (1970), may offer the Court some help by way of analogy. Althongh this procedure seems devious, the result is the same as would occur if the clause in question were an arbitration agreement. In Mitsubishi Shoji Kaisha Ltd. v. M/S Galine, 323 F. Supp. 79 (S.D. Tex. 1971), a charter-party contract contained a provision that all sections of COGSA should apply. It also provided that all contractual disputes were to be arbitrated in London. When a

Muller pointed out,[62] Congress has not made its view manifest by specifically banning forum agreements as other COGSA countries have done.[63] In view of the indefiniteness of the congressional position and in light of its expressed belief[64] in the need for flexibility in this area, in a future case similar to *Zapata*, but under COGSA, the Supreme Court may uphold a choice of forum clause. This would have the effect of forcing Congress to make known its policy toward international choice of forum agreements covered by COGSA. Congress would then have to ban choice of forum agreements specifically, provide for their enforcement, or remain silent, tacitly approving the Supreme Court's action.

CONCLUSION

In domestic litigation, the *Zapata* decision is likely to be very persuasive in excising the last vestiges of the invalid per se doctrine.[65] In fact, the Court labeled its finding in *Zapata* as merely the other side

---

dispute arose, the argument was raised that under *Carbon Black* and *Indussa* the arbitration clause should not be enforced because it was contrary to COGSA. *Id.* at 83. The district court refuted this argument by noting that arbitration agreements were endorsed by the Federal Arbitration Act. *Id.* at 83. The *Galine* court cited *Indussa* for the proposition that any differences between the two acts would probably be decided in favor of the Federal Arbitration Act because it had been enacted into positive law. *Id.* at 84. The court ordered the parties to proceed to arbitration. Thus, it would seem that under the *Galine-Zapata* rationale a conract within COGSA which contained both an exculpatory clause and an agreement to arbitrate in a foreign country would probably be so arbitrated. *See* A. KNAUTH, OCEAN BILLS OF LADING 239 (4th ed. 1953). By enforcing a choice of forum clause in this situation, the court would simply be taking upon itself the responsibility of treating choice of forum clauses the same way it has been directed to treat arbitration agreements by Congress.

The protection afforded by the *Zapata* test would support the central purpose of COGSA—protecting the shipper from adhesion contracts. *See* Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967): "When COGSA was enacted in 1936, it had as its central purpose the avoidance of adhesion contracts, providing protection for the shipper against the inequality in bargaining power." Commercial considerations and the realization that one of the parties is dealing from a background of different laws and traditions which might not include a COGSA-type statute could influence courts to adopt the arbitration model.

62 224 F.2d at 807.

63 *See* note 56 *supra*.

64 *See* notes 35-36, 41 and accompanying text *supra*.

65 In acknowledging that the circuits had differed in their approach to choice of forum clauses, the Court cited Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966). This case was not international in nature but involved a federal district court in Pennsylvania which declined jurisdiction in a controversy where the parties had provided by contract to arbitrate in New York under that state's laws.

of the proposition recognized earlier in *National Equipment Rental, Ltd. v. Szukhent.*[66] On the underlying issue of the exculpatory clause and similar clauses which would be contrary to a particular jurisdiction's public policy, the *Zapata* decision will most likely not affect domestic litigation. The need to relax these policy considerations on the domestic front is not as pressing as the need to excise all tinges of parochialism in the international area. Moreover, because of the relatively common judicial traditions among the states, conflicts with regard to public policy issues are less likely to arise.

One undeniable benefit of recent foreign relations developments will be increased international trade; decreased international hostility will mean increased international commercial involvement. The Supreme Court in *Zapata* appears ready to facilitate this development. Hopefully, under the aegis of *Zapata*, settled contract doctrines will be re-evaluated in light of the unique considerations presented by international commercial agreements, and courts will allow international contractors more freedom in their dealings.

Richard D. Avil, Jr.

[66] 375 U.S. 311 (1964). *See* note 45 *supra.*